



# California Fair Political Practices Commission

May 4, 1990

L. B. Elam  
County Counsel  
County of Sacramento  
700 H Street, Suite 2650  
Sacramento, CA 95814

Re: Your Request for Informal Assistance  
Our File No. I-89-467

Dear Mr. Elam:

You have requested advice on behalf of Sacramento County Supervisor Sandra Smoley regarding her obligations under the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1/</sup> Since your request involves hypothetical questions, we are treating it as a request for informal assistance.<sup>2/</sup>

## QUESTION

Under what circumstances is Supervisor Smoley prohibited from participating in decisions which will affect clients of her husband's architectural firm?

## CONCLUSION

Supervisor Smoley may not participate in any decision which she knows or has reason to know will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on any client who has provided income to her husband's firm of \$2,174 or more in the 12 months prior to the time when the decision is made.

## FACTS

Supervisor Smoley is married to Walter Rohrer, an architect who delivers architectural services on a fee-for-service basis

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<sup>1/</sup> Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

<sup>2/</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

within the Sacramento community. Mr. Rohrer owns a 23 percent interest in the architectural firm of Carissimi, Rohrer and Harper Associates Architects & Planners, Inc. ("the architectural firm").

In addition to her duties as a supervisor of Sacramento County, Ms. Smoley is a member of the board of directors of the Sierra-Sacramento Valley Emergency Medical Services Agency and the Sacramento Transportation Authority.

The facts you have submitted are lengthy and detailed. For purposes of brevity, your letter is attached and incorporated by reference in this advice letter.

#### ANALYSIS

The Act prohibits a public official from making, participating in making, or in any way attempting to use her official position to influence a governmental decision in which she knows or has reason to know she has a financial interest. (Section 87100.) An official has a financial interest in a decision if the decision will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on the official or a member of his or her immediate family or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

Section 87103(a)-(e).

Your questions deal primarily with persons or entities which are sources of income to Ms. Smoley through her husband's architectural firm. As a 23 percent owner of the architectural firm, 23 percent of all income to the firm is attributed to Ms. Smoley's husband. In turn, one-half of that income (her community property share) is attributed to Ms. Smoley. (Section 82030.) Thus, Ms. Smoley may not participate in any decision which will have a material financial effect on a person or entity which has provided income to the architectural firm of \$2,174 or more in the 12 months prior to the decision.<sup>3/</sup>

You have asked a series of hypothetical questions regarding possible decisions affecting clients or potential clients of the architectural firm. While we do not respond to questions which are purely hypothetical in nature, we will provide you with general guidance on the issues you have raised.

#### Knowledge of a Potential Conflict

You have asked in several contexts about Supervisor Smoley's duty of inquiry with respect to potential conflicts. As indicated above, a public official may not participate in any decision in which she "knows or has reason to know" she has a financial interest. Thus, if Supervisor Smoley knows the identity of a source of income and knows that a decision will have a reasonably foreseeable material financial effect on that source of income, she may not participate in the decision.

Supervisor Smoley is also prohibited from participating in any decision which she has reason to know will have a reasonably foreseeable material financial effect on a source of income. As a general rule, an official "has reason to know" that a decision will affect a source of income whenever a reasonable person under the same circumstances would be likely to know the identity of the source of income and would be aware of the decision's probable impact on that source. An official engaged in a business is not ordinarily required to take affirmative steps to familiarize himself or herself with the identities of all sources of income to the business, nor to consult his or her sources of income to determine whether a decision will affect them. Nevertheless, if Supervisor Smoley knows that a person or entity who is a source of income of \$250 or more will be affected by a decision, she must then determine if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the source of income. Obviously, this depends on the facts of each situation. (See Levy Advice Letter, No. A-87-222, and Price Advice Letter, No. A-85-165; copies enclosed.)

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<sup>3/</sup> (\$2,174 X .23) / 2 = \$250.

The facts you have provided indicate that support materials for a typical Tuesday meeting of the Board of Supervisors average 12 inches in total thickness, and contain a minimum of 2,000 pages. The support materials are provided to supervisors on the Friday preceding the Tuesday meeting. Obviously, if as a result of reviewing materials an official knows of a decision on which he or she has a conflict, disqualification is required. On the other hand, whether the official "has reason to know" of a conflict which is revealed in the materials will depend on the facts of each particular circumstance. An official may not avoid his or her disqualification obligations merely by failing to conduct the level of review which would be conducted by a reasonable person.

#### University of California

You have requested guidance regarding Supervisor Smoley's disqualification obligations with respect to decisions which affect the University of California. The Regents of the University of California is a public constitutional corporation created pursuant to the provisions of Article IX, Section 9, of the California Constitution. The University owns and operates multiple campuses throughout the state. One such campus is the University of California, Davis in Yolo County. On and as part of that campus is the University of California, Davis Medical School. The university also owns and operates the Sacramento Medical Center. That center is located in Sacramento County, and is a general hospital owned and operated by the university for the purpose of training future physicians and delivering patient care on a regional basis.

Six years ago Mr. Rohrer's architectural firm was selected by the university to perform architectural services associated with the rehabilitation of a wing of the Sacramento Medical Center. The architectural firm has worked continuously on that project for the past six years, and has received \$2,500 or more from the university in compensation each year. In addition, Mr. Rohrer has, in his personal capacity, worked for the university at the medical center under individual contracts, and has received more than \$500 per year in compensation for such services.

Under the facts provided, the university is currently a source of income to Supervisor Smoley. Accordingly, Ms. Smoley may not participate in any decision which will have a reasonably foreseeable material financial effect, distinguishable from its effect on the public generally, on the university. This disqualification obligation will continue to exist so long as the university has been a source of income to Ms. Smoley of \$250 or more in the 12 months preceding any particular decision.

#### Foreseeability

Whether a particular decision has a "reasonably foreseeable" effect on the University of California is the first determination to be made. An effect is reasonably foreseeable if there is a

"substantial likelihood" that it will occur. Certainty is not required; however, if the effect is but a "mere possibility," it is not considered reasonably foreseeable. (In re Thorner (1975) 1 FPPC 198, copy enclosed.)

### Materiality

Next, it must be determined whether the decision will materially affect the University of California. Commission Regulations 18702-18702.6 (copies enclosed) describe when the reasonably foreseeable effects of a decision are deemed material. Regulations 18702.1 and 18702.5 are applicable to the present situation.

If the university has initiated the proceeding in which the decision will be made, or if the university is a named party, or the subject of a proceeding before the board of supervisors, the effect on the university is presumed to be material. (Regulation 18702.1(a)(1).) In other decisions which would have a less direct effect on the university, the effect of a decision will be considered material if it will affect the university by the amounts specified in Regulation 18702.5.<sup>4/</sup> Given the size of the University of California, we believe the standard set forth in Regulation 18702.5(a) is the appropriate standard to apply. Thus, a decision which indirectly affects the university will be considered material if it will increase or decrease the university's gross revenues, assets or liabilities of the university by \$1,000,000 or more, or if it will increase or decrease the university's expenditures by \$250,000 or more. (Regulation 18702.5(a).)

### Public Generally

Finally, it must be determined whether the effect of the decision on the university will be distinguishable from the effect of the decision on the public generally. Regulation 18703 (copy enclosed) provides that the effect of a decision on the university is distinguishable from its effect on the public generally unless the decision will affect the university in substantially the same manner as all members of the public or a significant segment of the public. Generally, due to the confined size of the project in question as compared to the territory of the county, the decisions which you have mentioned involving the university will affect the university in a unique manner distinguishable from the effect on the public generally. (See, In re Legan (1985) 9 FPPC 1; Contreras Advice Letter, No. I-86-312, copies enclosed.)

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<sup>4/</sup> Regulation 18702.5 deals specifically with decisions affecting nonprofit entities. Although perhaps not strictly applicable, we believe it is the best available standard to provide guidance on whether decisions affecting the university should be considered material.

Assessments, Fees and Taxes

Your next questions involve decisions with respect to the formation of assessment districts, Mello-Roos districts and "fee" districts. Again, we will not respond to the hypothetical questions you have posed, but will provide general assistance with respect to your questions.

First, you have asked about Ms. Smoley's disqualification obligations with respect to formation of these districts, if at the time of the decision she has personal knowledge that one of the property owners within the proposed district has been a source of income to her, through the architectural firm, of more than \$250 in the 12 months preceding the decision. In such circumstances, Ms. Smoley may not participate in any decision which will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on the property owner.

In determining whether the reasonably foreseeable effects of a decision are material, it is first necessary to determine whether the source of income is directly or indirectly involved in the decision. If the source of income is directly involved in the decision, the effect is material. (Regulation 18702.1(a)(1).) If the source of income is indirectly involved in the decision, we must consider the materiality tests set out in Regulations 18702.2, 18702.5 or 18702.6, depending on whether the source of income is a business entity, a nonprofit entity, or an individual.

A source of income is directly involved in a decision when that person or entity, either personally or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency.

(3) A person or business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity.

Regulation 18702.1(b)(1), (2) and (3).

Under this provision, if a property owner who is a source of income initiated the proceeding to form the district, he or she is directly involved in the decision. (Regulation 18702.1(b)(1).)

Furthermore, if the decision involves an "entitlement to or contract with" the source of income, he or she is directly involved in the decision.<sup>5/</sup> (Regulation 18702.1(b)(2) and (3).) Accordingly, Ms. Smoley must disqualify from such a decision, unless the decision will have a similar effect on the public generally.

If the source of income to Ms. Smoley is not directly involved in the decision, a determination must be made as to whether the indirect effect of the decision on the source of income will be material. If the source of income is an individual, this determination would be made pursuant to Regulation 18702.6. If the source of income is a business entity, this determination would be made pursuant to Regulation 18702.2.

#### Public Generally

As described above, the question to be addressed here is whether the effect of the decision on Supervisor Smoley's source of income will be similar to the effect on the public generally or on a significant segment of the public. (Regulation 18703.) I have enclosed several letters dealing with the topic of "public generally" which will provide guidance regarding application of these tests in specific circumstances. (Scher Advice Letter, No. A-88-479; Flynn Advice Letter, No. I-88-430; Aleshire Advice Letter, No. A-88-325; Gordon Advice Letter, No. I-87-223; Remelmeyer Advice Letter, No. I-87-210; Levinger Advice Letter, No. A-87-061; Hazard Advice Letter, No. A-86-302.)

#### Contract Bids

With respect to the formation of assessment districts, you have also asked whether Ms. Smoley would be disqualified from participating in a decision regarding the letting of a contract

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<sup>5/</sup> The language in Regulation 18702.1(b)(3) is similar to language in Section 84308(a)(5) which refers to a "license, permit or entitlement for use." In determining what is an "entitlement for use" as the term is used in Section 84308, we have looked for guidance at how the courts have viewed provisions of the California Environmental Quality Act ("CEQA"), which use that same term. In Friends of Lake Arrowhead v. Board of Supervisors (1974) 38 Cal. App. 3d 497, 509, and People v. County of Kern (1974) 39 Cal. App. 3d 830, 837-840, the final discretionary acts of a public agency regarding the development of property were considered "entitlements for use" for purposes of CEQA. Similarly, in Bozung v. Local Agency Formation Com. (1975) 13 Cal. 3d 263, 278-279, the California Supreme Court held that a local agency formation commission's approval of annexation of territory to a city was an "irrevocable step" as far as that particular public agency was concerned, and thus involved the issuance of an entitlement for use for purposes of CEQA.

for construction of the infra-structure improvements if she has received income from one of the property owners in the district. As indicated above, the issue is whether the decision would have a reasonably foreseeable material financial effect on the source of income. Will the decision make any difference in whether, or in what manner, the assessment district is completed? If so, will that difference be material as to the source of income? Will the decision have a similar effect on a significant segment of the public? Again, these are the determinations to be made. (See Manq Advice Letter, No. A-85-082, copy enclosed.)

#### Other Types of Financing

You have also asked about Ms. Smoley's disqualification obligations with respect to decisions about other types of financing mechanisms, where sources of income to Ms. Smoley may be affected. Specifically, you have asked about Mello-Roos districts, fee districts created pursuant to Article XI, Section 7 of the California Constitution, and fees imposed for the purpose of financing public improvements on an unincorporated area-wide basis.

In each case, the analysis is the same as described above for the formation of assessment districts. First, it must be analyzed whether the decision will materially affect the source of income. Next, it must be determined whether the decision will have a similar effect on the public generally or on a significant segment of the public.

#### Flood Control

You have also asked about Ms. Smoley's disqualification obligations with respect to decisions relating to some proposed flood control projects. A two-phased improvement program has been determined to be required to relieve the flooding threat which became apparent in 1986. Phase 1 would consist would consist of a project under which existing levies on the Sacramento and American Rivers would be strengthened. Phase 2 would involve construction of the proposed Auburn Dam and increasing the height of existing levies.

Approximately 7.5 percent of the cost of these projects would be paid for by local governments, with the federal and state government paying the remainder of the costs. It is proposed that a joint powers authority be formed for purposes of funding the local government share of these projects. The governing body of the new authority would consist of elected officials who represent various interest'd local governments, including the County of Sacramento, the City of Sacramento, and various flood control and reclamation districts. All five supervisors would be seated on the governing body of the authority.



reclamation districts. All five supervisors would be seated on the governing body of the authority.

Both phases of the flood control projects would be undertaken by the United States Army Corps of Engineers (the "Corps"). The Corps has been an ongoing source of income to the architectural firm and it is anticipated this will continue in the future. Accordingly, you have asked about Ms. Smoley's disqualification obligations with respect to decisions which will affect the Corps.

The Corps is an agency of the federal government. Generally, decisions which financially affect a government agency such as the Corps, have a similar effect on the members of the public under that agency's jurisdiction, in this case meaning, all members of the public in the United States. (Winston Advice Letter, No. I-88-318, Hart Advice Letter, No. A-83-264, copies enclosed.) We note that the particular decision in question will have a widespread, similar effect on the public within the jurisdiction of the flood control authority as well. Accordingly, Ms. Smoley will not have disqualification obligations with respect to decisions affecting the Corps.

#### Transportation Authority Financing

Ms. Smoley is also a member of the Sacramento Transportation Authority ( the "Authority"). The Authority levies a one-half cent sales tax for the purpose of funding road improvements and public transit. The Authority has entered into a master-contract with the county, the cities of Folsom, Isleton, Galt and Sacramento, and the Sacramento Regional Transit District. The contract regulates the purposes, objects, and procedure for disbursement and expenditure of ongoing revenues received by the Authority from the sales tax.

You have asked about Ms. Smoley's disqualification obligations with respect to decisions which might affect sources of income to her. Again, the question is whether the particular decision will have a material financial effect, distinguishable from the effect on the public generally on that source of income. The analysis discussed above should again be followed.

Assuming the sources of income are individuals, Regulation 18702.6 provides that the materiality guidelines in Regulation 18702.3 are to be used with respect to decisions affecting the individual's real property interests. Regulation 18702.3 provides that if the decision will result in the real property receiving new or substantially improved services, the effect of the decision is material. This generally refers to improvements on or immediately adjacent to the source of income's real property.

If the improvements will not occur on, or adjacent to, the individual's real property, materiality is determined pursuant to the other provisions of Regulation 18702.3. Which provision of the regulation is appropriate depends on whether the decision involves

a particular property or properties which can be considered the subject of the decision. If so, the tests provided for in Regulations 18702.3(a) and (b) should be applied based on the distance which the source of income's real property is located from the property which is the subject of the decision. For example, if the decision is to widen a 1 or 2 block stretch of a major thoroughfare 1 block from the official's house, or to build a bridge or freeway access near the official's property, the distance tests will apply. However, if the decision is to pave all of the roads in a large section of the city, the distance tests do not apply. Rather, using Regulation 18702.3(c), materiality will be determined based upon the foreseeable effect in terms of dollars upon the source of income's real property interest.

#### Business Licensing

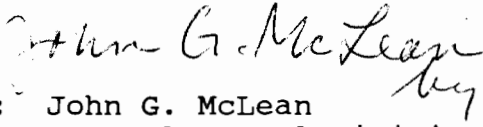
Finally, you have asked about Ms. Smoley's disqualification obligations with respect to decisions regarding the fee to be charged for business licenses. Again, the assumption is that one or more of these businesses is a source of income to Ms. Smoley.

The question is whether the decision will have a material financial effect, distinguishable from the effect on the public generally on that source of income. You have indicated that there are nearly 21,000 owners of licensed businesses. In such circumstances, it is clear that an across-the-board increase of the fees charged to all of these businesses will not require Ms. Smoley's disqualification. Such a group constitutes a significant segment of the public. In re Owen (1976) 2 FPPC 77, copy enclosed.)

If you have any further questions, please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan  
General Counsel

  
By: John G. McLean  
Counsel, Legal Division

KED:JGM:plh

Enclosures